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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MARC A. MATOZA, Plaintiff and Appellant, v. NETSCAPE COMMUNICATIONS CORPORATION, et al., Defendants and Appellants.	H024056 (Santa Clara County Super. Ct. No. CV777643)

In an action by an employee against his employer, the trial court sustained demurrers as to three causes of action, and later granted summary adjudication as to the remaining nine causes of action. The employee moved for a new trial and the trial court granted the motion as to the first cause of action, for breach of the employment contract. The dispute involved 20,000 shares of stock the employee contended he was entitled to under the employment contract. In granting a new trial, the trial court found there were triable factual issues as to whether there was a binding accord and satisfaction between the parties that settled the dispute. We affirm the order granting a new trial.

BACKGROUND

In 1994, Marc Matoza began working for Netscape Communications Corporation (Netscape), which at the time was a startup company known as Mosaic Communications. Before signing an employment agreement he met and had lengthy discussions with John

Kohler, vice-president of customer support, and with Jim Clark, one of the founders of the company and its president and chief executive officer. On July 5, 1994, Kohler presented Matoza a letter offering employment, signed by Clark. It provided for a salary of $9,000 per month and options to purchase up to 40,000 shares of common stock. In addition, it provided that the company "will make available another 20,000 shares triggered by a performance program to be jointly developed when you arrive." As to the additional 20,000 shares, Matoza testified that he and Kohler discussed this and that Kohler made it clear that these were shares of stock, rather than options, that would be given to him upon completion of a performance program. Matoza signed the offer letter the same day and began work immediately.

Matoza developed a performance program that required him to complete a customer response center business plan and hire people according to that plan, and to close at least one original equipment manufacturer (OEM) deal prior to December 31, 1994. Both Kohler and Clark approved the program, and Kohler was initially assigned to manage the program. By December of 1994, Matoza had completed all three elements of this program. The OEM contract that Matoza closed, on November 22, 1994, was with Digital Equipment Corporation (DEC). Kohler testified that he believed "it was fair for the company to complete its transaction with Marc with an additional 20,000 shares because he had in fact completed his tasks." However, in November Kohler had been replaced by Todd Rulon-Miller as Matoza's reporting manager. Rulon-Miller conducted an evaluation of Matoza's work and learned that other Netscape managers, including the head of engineering and the head of marketing, had been critical of Matoza's performance on the DEC contract, believing he had over-committed Netscape's resources.

After the DEC contract was completed, Matoza reminded Rulon-Miller of Netscape's promise to deliver him 20,000 shares for completing his performance program. According to Matoza, Rulon-Miller said he would take care of this when the quarter ended. In January of 1995, Matoza asked Clark about the 20,000 shares. Clark said that Rulon-Miller would take care of this. Rulon-Miller stated that after evaluating

Matoza's performance, and hearing the criticisms of Matoza's conduct in the DEC transaction, he believed that Matoza had exercised poor judgment in this transaction and that he was not entitled to the performance stock. Rulon-Miller communicated these criticisms to Matoza. Matoza was aware of the criticisms, but did not believe this affected his entitlement to the 20,000 shares.

In March of 1995, when Matoza again asked Rulon-Miller for the 20,000 shares, Rulon-Miller refused. According to Matoza: "Todd [Rulon-Miller] told me that he felt that I had too many shares already and that he was not going to give me those shares, and that if I brought it up again, he'd fire me." Matoza brought the matter up with Kandis Malefyt, Netscape's director of human resources. She said she would look into it and get back to him. According to Malefyt, she contacted Rulon-Miller and told him to "handle it and try to work something out."

Some time in May of 1995, according to Matoza, Rulon-Miller informed him that, as a result of his performance in the first quarter of 1995, he would receive options to purchase 10,000 Netscape shares. Matoza understood that this was due to his closing an important contract with Sun Microsystems, and that it was entirely separate from the 20,000 shares he believed he was still entitled to under the employment contract. However, Rulon-Miller later told him that this performance grant of 10,000 share options was to be in lieu of the performance grant shares referred to in the parties' employment contract. Matoza strongly disagreed with this. When Rulon-Miller brought it up again, Matoza again adamantly disagreed.

On June 14, 1995, Matoza sent an e-mail to Rulon-Miller. The e-mail, addressed to Rulon-Miller, with the subject caption of "Stock," stated: "Per our conversation, I accept your offer of 10K shares to satisfy the 20K share option in my employment contract [¶] Let me know when this will be executed" According to Matoza, Rulon-Miller had dictated this e-mail and ordered him to send it or else he would be fired.[1]

[1] In the summary adjudication proceeding, Matoza acknowledged that he was presenting no claim based on economic duress.

Matoza did not think that it meant he was giving up his rights to the 20,000 shares in his employment contract, in part because the e-mail referred to "20K share option" rather than 20,000 shares. Furthermore, there was no formal agreement modifying the original employment contract. Matoza said he had added the last sentence of the e-mail contemplating that a written agreement would be forthcoming.

Upon receiving this e-mail, Rulon-Miller forwarded it to Kandis Malefyt, Netscape's director of human resources. In his forwarding message, he wrote to Malefyt: "Per our discussion yesterday, I offered Marc a 10K resolution for DEC, etc. He agreed. What paperwork (memo?) should I initiate to get this done?" Malefyt added Matoza's name to a list of employees who had been recommended to receive option grants for outstanding performance. The list was approved by the Netscape board at a meeting on June 19, 1995.

Shortly thereafter, Matoza received the paperwork for a grant of stock options, with a cover letter offering him "Congratulations." Rulon-Miller and Matoza both signed the grant of stock options on July 21, 1995. The paperwork did not refer to any reason for the grant of options. Because of a two-for-one stock split to take place in August, the stated number of option shares was 20,000.

Matoza continued working for Netscape until January of 1998, when he was terminated. He did not make any further demands regarding the 20,000 shares while he was working at Netscape.

Matoza filed this action on October 29, 1998, alleging that Netscape breached the employment contract by refusing to deliver to him the 20,000 shares of stock for completing the performance program in 1994. An amended complaint was filed October 10, 2000, adding America Online, Inc. as a defendant[2] and adding five new causes of action relating to the vesting of stock options that Matoza had received while employed at Netscape. Netscape's demurrer to the new causes of action was sustained with leave to amend.

Matoza filed his second amended complaint on December 27, 2000. The first cause of action continued to allege a breach of contract based on the 20,000 shares of stock promised in the employment agreement. Eleven other causes of action were pleaded, alleging various claims relating to the vesting of options received by Matoza during his employment, including breach of contract, fraud and deceit, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty. Another demurrer followed as to the eleven vesting causes of action, and the demurrer was sustained as to three causes of action alleging breach of an implied covenant of good faith and fair dealing. Matoza elected not to amend. On July 19, 2001, Netscape filed a motion for summary judgment or summary adjudication as to all remaining causes of action.

As to the first cause of action for breach of a contract to deliver 20,000 shares of stock, Netscape argued that the e-mail sent by Matoza and his acceptance of the grant of stock options in 1995 constituted an accord and satisfaction resolving the dispute regarding the shares Matoza claimed were due under the employment contract. Netscape further contended that the evidence established an equitable estoppel, in that Matoza never raised his claim again after accepting the grant of share options in 1995, until this suit was filed in 1998. Netscape also argued that the action was barred by laches.

The court granted summary adjudication as to the first cause of action, finding that the evidence established all of the elements of an accord and satisfaction, and that Matoza failed to raise any triable issue of fact. As part of its holding, the court wrote: " 'A writing is not essential to an accord and satisfaction; it may be implied.' [Citation]." The court also granted summary adjudication as to the remaining causes of action. The court filed its order September 14, 2001. Because this order, together with the previous order sustaining the demurrer as to three causes of action, disposed of all causes of action, counsel prepared a judgment in favor of Netscape. The judgment was signed by a

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[2] America Online acquired Netscape in April of 1999.

different judge and filed October 16, 2001. However, prior to this, on October 1, 2001, Matoza filed a notice of intention to move for a new trial.

Matoza sought a new trial on all causes of action. He contended that the court erred to the extent that it found that the accord and satisfaction was an implied agreement, because Netscape had based its defense and its summary judgment motion entirely on the existence of an express contract representing an accord, namely the June 14, 1995 e-mail. He further claimed that the evidence was in dispute regarding all of the elements of an accord and satisfaction. In particular, the e-mail expressly provided for 10,000 shares, and not options to purchase 10,000 shares, which was what Netscape later delivered to him.

In an order filed November 30, 2001, the judge who had previously granted summary adjudication granted Matoza's new trial motion as to the first cause of action only. The court wrote: "While the court believes that a reasonable (and likely interpretation of the evidence) is that an accord and satisfaction was reached between plaintiff and Mr. Rulon-Miller, the court agrees that the evidence is disputed. There is sufficient difference between 'shares' and 'share options' that a triable issue of fact remains."

Netscape appealed from the order granting a new trial on January 25, 2002. Matoza filed a protective cross-appeal from the judgment on February 14, 2002.

Appealability and Standard of Review

"A motion for a new trial is appropriate following an order granting summary judgment." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 858.) "This is so, even though strictly speaking, 'summary judgment . . . is a determination that there shall be no trial at all.' [Citation.]." (*Ibid.*) An order granting a new trial is appealable. (Code Civ. Proc., § 904.1, subd. (a)(4).) "It makes no difference that an order granting a new trial may operate like an order denying summary judgment, which is nonappealable." *(Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 858; *Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 643-644, fn. 4.)

Although, as a general rule, an order granting a new trial is reviewed under the abuse of discretion standard, "any determination underlying any order is scrutinized under the test appropriate to such determination." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 859.) The trial court's order granting a new trial in this case was based on its determination that there were triable factual issues as to the first cause of action. Such a determination is reviewed independently by this court, under well-established standards for reviewing summary judgments. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at pp. 859-860.) We first look to the plaintiff's complaint, in order to identify the causes of action for which relief is sought. We then examine the defendant's motion to determine whether it shows that "one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant's showing establishes the elements of a complete defense to a cause of action, "the burden shifts to the [plaintiff] . . . to show that a triable issue of one or more material facts exists as to that . . . defense. . . ."

Because the defendant is the party bringing the motion and seeking the court's action in its favor, defendant "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) Furthermore, defendant would also bear the burden at trial of proving its affirmative defense by a preponderance of the evidence. In such a case, in order to succeed at summary judgment defendant must present evidence that would *require* a reasonable trier of fact to find the material facts underlying the defense more likely than not. (*Id.* at p. 851.) Otherwise defendant "would not be entitled to judgment *as a matter of law*, but would have to present *his* evidence to a trier of fact." (*Ibid,* italics in original.)

Accord and Satisfaction

Matoza's first cause of action alleged that Netscape breached the written 1994 employment agreement, which provided that, in addition to an option to purchase up to 40,000 shares of common stock, he was to receive "another 20,000 shares triggered by a performance program . . . ." Matoza alleged that he completed the performance program and that Netscape breached its promise to deliver the 20,000 shares of performance stock. In its answer, Netscape asserted the affirmative defenses of accord and satisfaction, equitable estoppel, and laches. As to the first defense, Netscape contended in its summary judgment motion that a dispute developed as to whether Matoza had satisfactorily completed the performance program, and that in 1995 the parties reached an accord and satisfaction settling the dispute, by which Netscape offered and Matoza accepted options to purchase 10,000 shares of stock.

To prove an accord and satisfaction, a defendant must prove three elements. First defendant must show that there was a " 'bona fide dispute' " regarding the obligation underlying plaintiff's cause of action. (*Thompson v. Williams* (1989) 211 Cal.App.3d 566, 571.) Secondly, defendant must show an "accord," which is defined in the Civil Code as "an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled." (Civ. Code, § 1521.) Finally, defendant must show the "satisfaction," or the "[a]cceptance . . . of the consideration of an accord." (Civ. Code, § 1523.) This "extinguishes the obligation." (*Ibid.*)

Evidence submitted by defendant showed the existence of a bona fide dispute between Matoza and Netscape as to whether Matoza had satisfactorily completed his performance program and was thus entitled to the performance stock pursuant to the parties' 1994 employment agreement. Matoza contended he had completed all three elements of the performance program within the agreed upon time. His original manager, John Kohler testified that Matoza had in fact completed the performance program and

was entitled to the stock. On the other hand, Todd Rulon-Miller, who replaced Kohler as Matoza's manager, believed that Matoza's conduct in the DEC transaction was unsatisfactory and that he had not earned the performance stock. He based this belief on interviews with other Netscape managers who were critical of Matoza's conduct in the DEC transaction and were dissatisfied with the DEC contract.

Netscape submitted a declaration of Dr. Schell, in which Schell stated that he believed Matoza had "acted dishonestly" in connection with the DEC transaction. He stated that "Matoza had misled me with respect to the DEC deal, that he had made an unreasonable commitment of Netscape's engineering resources contrary to my prior discussions with him, that his role in the DEC transaction had harmed Netscape, and that he should be terminated for his poor performance under the circumstances."

Netscape's head of marketing, Michael Homer, was also critical of the contract Matoza had formed with DEC. According to Rulon-Miller, Homer felt that "Mr. Matoza in the DEC negotiations had agreed to provisions in the contract that imposed significant commitments on Netscape's marketing organization without adequate consultation with Mr. Homer's organization." In deposition, Matoza acknowledged that he knew that both Schell and Homer had been critical of his work in the DEC transaction.

Rulon-Miller stated that he regarded these criticisms from other Netscape managers to be significant factors in his assessment of Matoza's 1994 performance. He "believed that there was a serious question about Mr. Matoza's performance of his duties with respect to the DEC transaction." And he concluded that "Mr. Matoza had exercised poor judgment when performing his role in the DEC transaction, to Netscape's detriment." Rulon-Miller communicated these criticisms to Matoza and informed Matoza that he did not agree with Matoza's claim that he was entitled to performance stock under the 1994 employment agreement.

Matoza contends that Rulon-Miller gave him a different reason for refusing to deliver the performance stock, namely that Matoza "had enough stock." Rulon-Miller

conceded he may have said this, but asserted that his main reason for rejecting the claim for performance stock was his conclusion that Matoza's performance was unsatisfactory.

We believe the evidence established the first element of an accord and satisfaction, that there was a dispute regarding the underlying obligation. Defendant need not prove that its position was legally correct, only that it had an "honest" reason for disputing the obligation. (*Thompson v. Williams, supra,* 211 Cal.App.3d at p. 573.) The declarations of Rulon-Miller and Schell establish that Netscape honestly disputed Matoza's entitlement to the performance stock. Matoza is unable to show any triable issue as to this element.

As to the second two elements, Netscape sought to establish that the June 14, 1995 e-mail from Matoza to Rulon-Miller was an "accord," and that Matoza's acceptance of the July 21, 1995 grant of stock options was a "satisfaction." Netscape contended that the e-mail was clear evidence of "an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled." (Civ. Code, § 1521.) Netscape argued that it was undisputed that prior to this e-mail Rulon-Miller had verbally offered Matoza 10,000 options in settlement of Matoza's claim for 20,000 shares pursuant to the 1994 employment agreement, and that this was the offer referred to in the e-mail, which stated: "Per our conversation, I accept your offer of 10K shares to satisfy the 20K share option in my employment contract." Furthermore, Kandis Malefyt stated that she discussed with Rulon-Miller Matoza's claim for 20,000 shares of stock and Rulon-Miller told her that he had "reached a compromise resolution with Mr. Matoza." He then forwarded to her a copy of Matoza's e-mail, which she "understood to be documentation of the settlement."

In response, Matoza submitted evidence that there was never any binding agreement to settle his claim to the 20,000 shares of performance stock. He testified that in the spring of 1995, there was a company-wide program at Netscape to reward employees whose performance had been outstanding in the first quarter. He had received

numerous accolades from people within the company, including Rulon-Miller, for his work on the Sun Microsystems deal. Some time in late April or early May, he received a "Sales Excellence" award and was presented with a trophy by Rulon-Miller. In late May, Rulon-Miller again congratulated him on closing the Sun deal and told him as a result of this he would be granted options to purchase 10,000 shares of Netscape stock. When he received the July 1995 grant of 10,000 option shares, it was with a letter of "Congratulations" from Netscape. In his declaration in response to summary judgment Matoza stated: "At the time I received and signed Netscape's 1995 'Notice of Grant of Stock Option' I understood that that option had been granted to me in recognition of my 1995 sales excellence in connection with Sun and other significant Netscape transactions as indicated by Netscape's 'Congratulations' transmittal memorandum and as previously communicated to me by Rulon-Miller, and had nothing to do with the 20,000 shares owed to me as a result of my completion of my July 5, 1994 performance program, the DEC deal or any other matter."

Netscape points out that in his earlier deposition, Matoza had said that he understood the 1995 grant of options "was for my performance on the Sun deal *and* it related to 10,000 share options that were offered me by Todd Rulon-Miller." (Italics added.) But Matoza explained that by this he meant only that Rulon-Miller had offered him 10,000 share options for his sales achievements in 1995.

In regard to the circumstances leading up to e-mail he sent to Rulon-Miller, Matoza explained this in deposition as follows: "Mr. Rulon-Smith came to my desk and pulled me off into a conference room. He told me that those 10,000 share options that I was getting were for the 20,000 shares that were due me under the performance program. [¶] I questioned that because he had told me that the 10,000 shares options were because of Sun. I mean, it seemed like it was a different conversation going on here. I told him that that didn't make any sense to me since one were shares and the other were share options, and two different values, two different price points. [¶] . . . [¶] So when he

came and told me that those were for the 20,000 shares, I told him I didn't agree with that. That was the end of that meeting."

The next thing Matoza remembered happening was as follows: "Todd again took me in a conference room. He told me that I was going to send him an e-mail that would indicate that I was trading those shares and that I was to do it immediately, and he dictated the details of that e-mail to me."

"Q: What did you do?

"A: I listened to him. Did not respond. I walked out of the meeting, and I did not send the e-mail at that point in time."

Later, on June 14, 1995, Matoza said he was sitting at his desk when "Mr. Rulon-Miller came over to my desk, told me that I was to send an e-mail. He dictated the contents of the e-mail to me. He told me to send that to him immediately . . . . [¶] . . .[¶] I told him that I did not agree with the e-mail. I made it very clear to him I did not agree to the transaction, and I did not want to send an e-mail. He told me to send the e-mail." Matoza said he felt there was no point in arguing: "I sent the e-mail he directed me to send."

"Q: Why did you send the e-mail?

"A: I would have been fired if I hadn't sent that e-mail. [¶] . . . [¶] I told him point blank I didn't agree, and he told me point blank to send it."

Matoza explained that he typed word for word what Rulon-Miller dictated: "Again, I didn't have – again, I don't understand anything. This was dictated. This was not – I did not have any opportunity to talk, to change any words, and/or even to respond, other than I took the bodacious position of saying I don't agree, which I was told to send it. I added the 'Let me know when this will be executed' because I wanted to know what he was proposing."

Matoza did not believe that the e-mail meant he had surrendered his rights to the 20,000 shares in the employment agreement, because it did not refer to shares but only to

options. He explained: "I did not understand Mr. Rulon-Miller's reference to '20K share option' to be a reference to 20,000 shares, especially since the only reference to options in my July 5, 1994 offer letter was to an option to purchase 40,000 shares. I did not then understand or believe that I had in fact 'agreed' to give up my 20,000 shares, and did not at the time understand the June 14, 1995 e-mail dictated to me by Mr. Rulon-Miller as representing my 'acceptance' of an option to purchase 10,000 shares in exchange for my right to receive the 20,000 shares owed as a result of my completion of the July 5, 1994 performance program." (Underscore in original.)

Furthermore, Matoza was aware that his employment agreement provided that any modification must be in writing and signed by both himself and a Netscape officer, and further that Netscape generally had a "blue ink" policy regarding agreements with employees. He expected he would receive an agreement to be signed pursuant to the e-mail, but he never did. He did not receive the 10,000 shares mentioned in the e-mail and he assumed the matter had been dropped. He did receive a performance grant of 10,000 share options, but this did not mention that it was in lieu of the 20,000 shares owed to him. Since the grant came with a letter offering him "Congratulations," he believed this grant was a bonus for his outstanding sales performance during 1995.

Netscape contends that the language of the e-mail – "I accept your offer of 10K shares to satisfy the 20K share option in my employment contract" – constituted the unequivocal language of an accord, and that notwithstanding Matoza's subjective understanding of its meaning there can be no other interpretation of this language under the circumstances. The question whether a binding accord has been formed is determined by application of the ordinary principles of contract law. (*Zuckerman v. Pacific Savings Bank* (1986) 187 Cal.App.3d 1394, 1405.) Mutual assent is the essential element in the formation of contracts; however, one party's subjective belief that the contract language means something other than what it says is not sufficient to defeat a finding that a contract has been formed. (*Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th

1370, 1376-1377.) Thus Matoza's statement that he never agreed to accept 10,000 options in lieu of the 20,000 shares he believed he was owed under his employment agreement would not by itself be sufficient to create a triable issue of fact as to the formation of an accord if the language of the agreement were not susceptible to such an interpretation. However, here the language of the e-mail gives rise to several ambiguities in light of the surrounding circumstances. Although it says that 10,000 shares were offered by Rulon-Miller, the evidence is that share options were offered, not shares. Furthermore, there was no "20K share option" in the parties' employment agreement. The agreement provided for two things: "an option to purchase up to 40,000 shares of common stock," and "another 20,000 shares triggered by a performance program." The e-mail thus does not accurately reflect either the offer Rulon-Miller stated he made to Matoza, or the terms of the original contract.

Aside from these inconsistencies, the e-mail on its face appears to contemplate that a written document expressing the parties' agreement in more detail would be drafted and executed. The e-mail calls for a response: "Let me know when this will be executed." Matoza said he inserted this because he "wanted to know what Mr. Rudon-Miller was proposing." "I expected something to come out of this that I wanted to see in writing. I wanted to see what was being proposed by Mr. Rulon-Miller by having me send this particular document." Rulon-Miller also apparently contemplated that some further paperwork would be necessary to finalize the agreement, since he wrote to Malefyt "What paperwork (memo?) should I initiate to get this done?" Where it is understood that an agreement is incomplete until reduced to writing and signed by the parties, no contract results until this is done. (*Beck v. American Health Group Internat., Inc.* (1989) 211 Cal.App.3d 1555, 1562.) Matoza testified that no one at Netscape responded to the June 14, 1995 e-mail, or ever mentioned it again.

Furthermore, because an accord is essentially a modification of a prior agreement, it follows that the accord must conform to the requirements for modification as expressed

in the original agreement. (See, e.g., *Marani v. Jackson* (1986) 183 Cal.App.3d 695, 705-706; *Beggerly v. Gbur* (1980) 112 Cal.App.3d 180, 189.) Here the employment agreement expressly provided: "Any additions or modifications of these terms would have to be in writing and signed by you and me or another officer of the Company." There was further evidence submitted of Netscape's policy that "blue-ink" documents, rather than e-mails, were necessary to create binding agreements. For instance, one policy statement provided: "Email often contains inaccurate or misleading statements, and is often in the nature of a draft. As a result, inappropriate or errant email can cause significant problems." Matoza was informed by Clark and by Netscape's legal department that "the only thing that bound the corporation was a 'blue ink' document."

Because the evidence at summary judgment showed that the terms expressed in the e-mail did not accurately reflect the parties' understanding, that the e-mail appeared to contemplate that a more formal agreement would be executed, and that the policy at Netscape was not to be bound by anything but a signed agreement in writing, we find triable factual issues were raised as to whether a binding accord was formed.

Netscape argues that the lack of a writing does not prevent formation of a contract, particularly where one party later accepts the other party's performance under the informal agreement. (See, *Cappelmann v. Young* (1946) 73 Cal.App.2d 49; Civ. Code, § 1698, subd. (b).) Here, however, there were disputed issues as to whether there was "[a]cceptance . . . of the consideration of an accord" sufficient to establish a "satisfaction." (Civ. Code, § 1523) Netscape contended that the grant of 10,000 options approved by the board and delivered to Matoza in July of 1995 was indisputably a performance of the accord agreement and thus constituted a satisfaction. But the e-mail called for 10,000 shares, not 10,000 options. Furthermore, the evidence was in dispute as to the reason for the grant of the 10,000 options. Matoza submitted evidence showing that a number of other employees were given option grants for their performance during this time, in anticipation of Netscape's going public in August of 1995. He also

submitted copies of several messages and letters, from Rulon-Miller and other Netscape managers, praising his work and congratulating him. For example, Rulon-Miller wrote to Matoza April 12, 1995, regarding the Sun Microsystems deal: "Per earlier kudo's, great job on this one! It really helped Netscape." Also in April of 1995, Marc Andreessen, one of the founders of Netscape, wrote a company-wide memo regarding the consummation of the Sun Microsystems deal: "Congratulations to Marc Matoza and everyone else who made this relationship happen!" Rulon-Miller presented a trophy to Matoza at a formal awards ceremony, at which those who had excelled at sales in the first quarter were honored. Matoza stated that Rulon-Miller had told him that he would be receiving an option to purchase 10,000 shares of Netscape stock as a result of his performance in securing the Sun deal. The board approved the option grant to Matoza as one of a list of other employees recommended by their managers for performance grants due to outstanding performance. Nothing in the board action indicated this was in lieu of shares owed to Matoza pursuant to his employment agreement. Moreover, the written grant of 10,000 options does not mention that it is in satisfaction of a previous debt or obligation. Rather it included a congratulatory note to Matoza, consistent with his understanding that it was intended to reward him for outstanding sales achievement in 1995.

Netscape argues that Matoza never communicated to Netscape his understanding that he was receiving the grant of options for his performance in 1995. On the other hand, neither did Netscape make clear to Matoza that the performance grant of 10,000 options was intended to be the "10K shares" referred to in the e-mail, and that it was in lieu of the 20,000 shares promised in the employment agreement. Furthermore, Matoza's understanding was supported by objective evidence that other employees were receiving performance grants for outstanding performance at the same time that Matoza received his, that he had been commended for his excellent work during the first quarter of 1995, and that Rulon-Miller had told him that he would be receiving 10,000 options for his outstanding performance.

Netscape contends that satisfaction was shown by the undisputed fact that Matoza did not continue to press his claim for the 20,000 shares after he received the performance grant for 10,000 options in 1995. We agree that this evidence tends to support a finding in Netscape's favor on this element. However, it is only one factor that may be given weight by a trier of fact. In light of other disputed evidence as to whether a binding accord and satisfaction was reached in this case, we cannot say that on this record a jury would be *required* to find all the elements of accord and satisfaction in Netscape's favor. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 851.) We conclude that Netscape did not carry its burden to establish that it was "entitled to judgment as a matter of law." (*Id.* at p. 850.) Thus the trial court did not abuse its discretion in granting the order for a new trial.

Estoppel

Netscape contends that the trial court erred in not making a specific finding as to its defense of equitable estoppel. This defense, however, is based on several of the same factual assumptions that underlie the defense of accord and satisfaction. Thus it can be implied that the disputed factual issues regarding the defense of accord and satisfaction would also defeat summary judgment as to equitable estoppel.

Estoppel requires first that the party being estopped know the facts. Here, as discussed above, there were factual disputes both as to the meaning of the e-mail and the reason for the grant of 10,000 options in 1995.

Netscape contends that "equity holds Mr. Matoza's silence against him if he had a duty to speak." (See, *Skulnick v. Roberts Express, Inc.* (1992) 2 Cal.App.4th 884, 891.) Such a duty, however, depends on whether Matoza was aware that the true facts were not as Rulon-Miller believed them to be. Although Netscape vigorously argues otherwise, we believe there was evidence on this record to support a reasonable inference that Matoza understood the 1995 performance grant of 10,000 options was in recognition of sales achievements and that he was not aware that Rulon-Miller and Netscape considered

it to be a final settlement of his claim to the 20,000 shares promised in his employment agreement.

Finally, Netscape argues that it relied on Matoza's silence to its detriment; during the three years before Matoza raised his claim, the price of its stock increased tremendously while the memories of key witnesses faded and documentary evidence was no longer readily available. Detriment alone, however, cannot establish an estoppel. Here Netscape had the burden of persuasion as to all of the elements of estoppel: "(1) [t]he party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury." (*Spray, Gould & Bowers v. Associated Internat. Ins. Co.* (1999) 71 Cal.App.4th 1260, 1268.) "Whether there is an estoppel is chiefly a question of fact." (11 Witkin, Summary of Cal. Law (9th ed. 1990) *Equity*, § 177.) As the previous discussion illustrates, factual disputes were raised at summary judgment in this case as to what was intended by the e-mail and the subsequent performance grant. We find that Netscape failed to carry its burden of establishing its affirmative defense of estoppel. The court did not abuse its discretion in granting a new trial on Matoza's first cause of action.

Cross-Appeal

Because we affirm the court's grant of a new trial on plaintiff's first cause of action, the judgment does not dispose of all of the issues in this case and is not an appealable judgment under Code of Civil Procedure section 904.1, subdivision (a)(1). (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743.) We will therefore dismiss Matoza's cross-appeal.

DISPOSITION

The order granting a new trial is affirmed. The cross-appeal is dismissed as taken from a non-appealable judgment. Marc A. Matoza is entitled to costs on appeal.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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PREMO, ACTING P.J.

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WUNDERLICH, J.